88-1933

Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

JOHN T. ATKINSON, JR., MARIE ATKINSON, HOMER L. OGDEN, AND ALL OTHER PERSONS SIMILARLY SITUATED

Petitioners,

vs.

GENERAL ELECTRIC CAPITAL CORPORATION

Respondents,

On Petition For a Writ of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the Eleventh Circuit Court of Appeals improperly adopt a presumption of federal preemption when, in construing choice of law provisions of mobile home contracts, it determined that the contracts were governed by federal law rather than by State law on the sole grounds that the seller of the mobile home charged an interest rate that was permissible under the Federal Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDMCA") but not under applicable State law?

LISTING OF ALL PARTIES TO THE PROCEEDINGS

The named Plaintiffs are John T. Atkinson, Jr., Marie Atkinson, and Homer L. Ogden. Other members of the putative class are individuals who entered into similar form mobile home contracts prepared by General Electric Credit Corporation and assigned to General Electric Credit Corporation in the State of Georgia between April 1, 1980 and March 31, 1983, and persons in other states who were charged finance charges in excess of the permissible limit in those states. The Defendant is General Electric Capital Corporation, formerly known as General Electric Credit Corporation.

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Mobile Home Usury Preemptions:
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The opinion of the United States District Court for the Southern District of Georgia dismissing the complaint, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure is unreported. The opinion of the Eleventh Circuit Court of Appeals affirming the decision of the District Court is reported at 866 F.2d 396 (11th Cir. 1989). (See Appendix A.)

JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals was initially entered on February 21, 1989, and the judgment denying the Petition for Rehearing was entered on March 27, 1989. The jurisdiction of this Court is invoked, pursuant to 28 U.S.C. §1254(1).

STATUTES, FEDERAL RULES, AND REGULATIONS INVOLVED

The Depository Institutions Deregulation and Monetary Control Act of 1980, 12 U.S.C. §1735f-7 (Note) is set forth in Appendix "B". The consumer protection rules contained at 12 C.F.R. §590.4 are set forth in Appendix "C".

STATEMENT OF THE CASE

This is a consumer class action brought by the Atkinsons on behalf of themselves and others. Count I invokes diversity jurisdiction and seeks relief under the provisions of the Georgia Motor Vehicle Sales Finance Act, O.C.G.A. §10-1-38, in that the Atkinsons and those similarly situated in Georgia have been charged finance charges in excess of those permitted by O.C.G.A. §10-1-33. The Atkinsons were charged finance charges of $29,552.80 computed at the rate of 19% per annum over a 15-year term, when the maximum finance charge permitted by Georgia law at the time was only $21,594.00.[1] In Count II, the Atkinsons seek damages under the Federal RICO Statute, 18 U.S.C. §1961, and invoke jurisdiction under 28 U.S.C. §1331. Count III is a multi-state consumer action brought on behalf of

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[1]A copy of the Atkinsons' mobile home contract is included in the Appendix as Appendix "D". The rate was computed at 10% add-on as follows: 10% x 15 years x $14,396 = $21,594.00. On a 15-year contract, the maximum rate in Georgia is 14.84% A.P.R.

individuals in other states who have been charged finance charges in excess of those permitted by the laws of those states.

The form contracts used by General Electric Credit Corporation contain on the reverse side the following choice of law provision:

> "GOVERNING LAW: Buyer and Seller agree that the construction and interpretation of the provisions hereof will be governed by the laws of the State of Georgia."

Nothing is contained in the form contract which indicates that this contract is made pursuant to or is intended to be governed by the provisions of the Depository Institutions Deregulation and Monetary Control Act of 1980, 12 U.S.C. §1735f-7 (Note) (hereinafter referred to as "DIDMCA") or the consumer protection regulations promulgated by the Federal Home Loan Bank Board, 12 C.F.R. §590.4.

The form contract provides under the paragraph entitled "Delinquency and Default" the following:

> "Time is of the essence hereof. Buyer agrees to pay as a delinquency

> charge on each payment which is more than 15 days late, 5% of the unpaid amount of such payment, not to exceed $5.00. Should Buyer fail to make payments when due or otherwise fail to perform any obligation or covenant under this contract, Seller may pursue any rights and remedies available to Seller under the law, to include repossession and/or acceleration of Buyer's indebtedness hereunder, provided that Buyer shall be given a notice of right to cure the default if required by applicable law before Seller may exercise such right. . ."

There is no "applicable law" in Georgia that requires any notice prior to repossession or nonjudicial foreclosure. The Uniform Commercial Code, as it exists in Georgia, O.C.G.A. §11-9-503, provides, and has been construed by the highest court in Georgia[2] to mean, that unless there is an agreement to the contrary, there is no requirement of any notice prior to repossession. The only notice required prior to bringing a judicial foreclosure in Georgia is a 7-day notice required by O.C.G.A. §44-14-230, 232(b). There

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[2]*Ford Motor Credit Company v. Hunt,* 241 Ga. 342, 245 S.E.2d 295 (1978).

is nothing in the contract to indicate that the parties to the contract intended that the contract be a DIDMCA contract, or that the applicable law was to be supplanted by DIDMCA.

The District Court dismissed this action pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. There is nothing in the record before the District Court or the Eleventh Circuit Court of Appeals from which the intent of the parties could be determined, other than the form contract itself.

ARGUMENT AS TO WHY THIS PETITION FOR CERTIORARI SHOULD BE ALLOWED

A. The Eleventh Circuit has adopted a presumption of federal preemption.

The Eleventh Circuit Court of Appeals, in holding that the contract was in fact a federal preemption contract as opposed to a contract governed by State law, based its holding on the following findings:

1. "Because the seller of the mobile home intended to charge appellants an interest rate that would be permissible under

> DIDMCA preemption, a more reasonable interpretation of the contract is that the choice of law provision was intended to govern contract matters not covered by DIDMCA." 866 F.2d at 398.

2. "It is readily apparent that the parties intended that DIDMCA apply, so to permit the seller, and subsequently GECC, to charge a higher rate of interest." 866 F.2d at 399.

In essence, the Eleventh Circuit Court of Appeals, by finding the existence of "intent" that is nowhere expressed in the four corners of the contract, has used its theory of contract construction as a means of adopting a presumption in favor of preemption. While in theory there is freedom of contract, when form contracts of adhesion are used, especially in consumer transactions, there is no freedom of contract and no bargaining as to terms of the contract. Therefore "intent" must be determined from the language of the document itself.

DIDMCA was not intended by Congress, nor is it, an absolute federal preemption of state

laws regarding mobile home financing. While Congress, in DIDMCA, provided for an absolute preemption as to certain loans or credit sale contracts which were secured by a first lien on conventional residential homes, Congress specifically provided that this preemption would not apply to mobile home financing unless certain conditions were met, providing in §501(c) of DIDMCA as follows:

> "The provisions of subsection A(a)(1) shall not apply to a loan, mortgage, credit sale, or advance which is secured by a first lien on a residential manufactured home unless the terms and conditions relating to such loan, mortgage, credit sale, or advance comply with the consumer protection provisions specified in regulations promulgated by the Federal Home Loan Bank Board. Such regulations shall:
>
> (1) Include consumer protection provision with respect to balloon payments, prepayment penalties, late charges and deferral fees;
>
> (2) Require a 30 day notice prior to instituting any action leading to repossession or foreclosure (except in the case of abandonment or other extreme circumstances);
>
> (3) Require that upon prepayment in full, the debtor shall be entitled to a refund of the unearned portion of the precomputed finance charge in

> an amount not less than the amount which would be calculated by the actuarial method, except that the debtor shall not be entitled to a refund which is less than $1.00; and
>
> (4) Include such other provisions as the Federal Home Loan Bank Board may prescribe after a finding that additional protections are required." [Emphasis added.]

It is therefore apparent that under the DIDMCA mobile home preemption scheme mobile home finance companies can, by selecting the terms and conditions of their contracts, have either:

1. Contracts in which they are allowed to charge finance charges in excess of those permitted by state law, that is, contracts that give consumers substantial protections, including the right to a 30 day notice prior to any action leading to repossession, acceleration or foreclosure as required by 12 C.F.R. §590.4(h) and DIDMCA, §501(c); or
2. Contracts governed by state law and in which the consumer is not given

> those additional consumer protections required by DIDMCA, such as rights to notice prior to repossession, foreclosure or acceleration, but is not charged the high finance charge rates allowed by the Federal statute.

In other circuits, the rule has been that it will not be presumed that a federal statute was intended to supersede the exercise of the power of a state unless there is clear manifestation of intent to do so. *Los Alamos School Board v. Wugalter*, 557 F.2d. 709 (10th Cir. 1977) at 714, cert. denied, 434 U.S. 968 (1978); *Poplach Forest, Inc. v. Hayes*, 318 F.Supp. 1368, aff'd 465 F.2d 1081 (8th Cir. 1972); *Chicago-Midwest Meat Association v. City of Evanston*, 589 F.2d 278 (7th Cir. 1978), cert. denied, 442 U.S. 946 (1979).

This Court has held that the burden of showing that Congress intended to preclude the states from providing traditional state law remedies for its citizens rests upon the defendant. *Silkwood v. Kerr-McGee Corp.*, 464

U.S. 238, 255 (1984). In areas of the law where Congress has allowed the "terms and conditions" of the contract to be determinative of the issue of preemption, the presumption should be against preemption.

In *Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University,* 489 U.S. ___, 103 L.Ed.2d 498, 109 S.Ct. ___ (1989), this Court held that a state choice of law provision did not conflict with the Federal Arbitration Act because "the FAA contains no express preemption provision, nor does it reflect a congressional intent to occupy the entire field of arbitration."

It is obvious from the terms of DIDMCA itself that it was not the intent of Congress completely to override the traditional powers of the states to regulate what finance charges can be charged. The legislative history of this statute as it relates to mobile home or manufactured home financing reveals that in February of 1980, Congress was at work on a major overhaul of federal preemption of state

limits on finance charges and interest rates. The National Manufactured Housing Finance Association petitioned leaders of Congress for an opportunity to suggest another preemption of state laws limiting finance charges as they applied to mobile home or manufactured home purchasers. See *Mobile Home Usury Preemptions: Hearings Before the Subcommittee on Financial Institutions and Consumer Affairs of the Senate Committee on Banking, Housing and Urban Affairs*, 99th Congress, 1st Session, 220, S. Hrg., 99-1382, (1985), p.153 (hereinafter referred to as "Senate Hearings").

In order to induce acceptance of the finance industry's request for an optional preemption of state laws, the industry argued that it would move away from contracts giving strong-arm rights to the creditor and would move toward "financing instruments. . .more like those used in real property mortgage

transactions." *Senate Hearings* at 205-206. [3] To "accelerate this development in the market place of such desirable protection" the industry suggested to Congress that preemption from state laws be conditioned upon protection for mobile home purchases that would be prescribed by the Federal Home Loan Bank Board ("FHLBB"). In their testimony to the House Committee considering the law, the finance companies noted that loans and sales "would not qualify for the exemption" if they fail "to incorporate appropriate purchaser protections." *Senate Hearings* at 207-108.

Congress accepted the finance companies' argument. In March of 1980, DIDMCA was passed. However, in passing DIDMCA, Congress expressly

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[3] On all uniform deeds of trust, mortgages and deeds to secure debt forms which have been approved by the Federal Home Loan Mortgage Corporation (FHLMC) and the Federal National Mortgage Association (FNMA) that are used in conventional residential home financing, borrowers are given a specific contractual right to a 30-day notice of default and right to cure prior to acceleration or foreclosure. This requirement is not a matter of law or regulation, but is merely an internal policy adopted by the FHLMC.

provided in §501(c) that the mobile home preemption would not apply "unless the terms and conditions relating to such loan, mortgage, or credit sale" complied with the consumer protection provisions. In other words, in order to enjoy preemptions from state limits on finance charges, the "terms and conditions" of a credit sale had to comply with the regulations. Nothing could be simpler or more straightforward.

House Conference Report No. 96-842, in discussing preemption or finance charges in connection with mobile home loans, stated the following:

> "Manufactured housing is covered by the mortgage usury preemption as long as such financing complies with the consumer protection provisions specified in regulations of the FHLBB." *House Conference Report No. 96-842*, reprinted in 1980 U.S. Code Cong. and Admin. News, 309.

Again, the message was clear and unmistakable; if a finance company wants preemption, it must pay the price by granting consumer protections.

The FHLBB, in adopting regulations pursuant to this act, made it clear that the sale or loan documents must comply with the consumer protection regulations, or else the transaction is subject to attack under state "usury" laws. *Federal Register*, May 20, 1980, Vol. 45, p.31122, and June 30, 1980, Vol 45, p.43681.

It is obvious that Congress did not manifest an intention to deal with this area to the exclusion of all state laws, but intended to allow finance companies to have the right to make a choice, that is, to continue to be governed by state law or to elect, by the terms and conditions of their contracts, to fall within the federal scheme.

It has long been the law in other circuits, in Georgia, and in the Eleventh Circuit Court of Appeals prior to this opinion, that in construing a contract unambiguous language is controlling as to the intent of the parties and that a court should not look outside of the terms of the contract in order

to determine "intent." See 17 Am.Jur.2d "Contracts" §245, 17A C.J.S. "Contracts" §296(1) and cases cited therein. In the case at hand, it is obvious that the Eleventh Circuit began its analysis by presuming that the parties intended that the contract be a federal preemption contract as opposed to a contract governed by state law, thus, beginning its analysis with a presumption of federal preemption. It did so in spite of a clear provision stating that Georgia law would apply.

If, for some reason, the choice of law provision selected by GECC in its contracts of adhesion is ambiguous as to whether the contract is a federal preemption contract or a contract governed by state law, then, the Eleventh Circuit should have followed the general principle of law adopted in other circuits and in Georgia that contracts of adhesion are to be strictly construed against the drafter. O.C.G.A. §13-2-2(5); *Kennedy v. Brand Banking Co.*, 245 Ga. 496(2), 500, 266 S.E.2d 154 (1980); *C.A. May Marine Supply*

Company v. Brunswick Corp., 557 F.2d 1163 (5th Cir. 1977), 17 Am.Jur.2d "Contracts" §276.

B. The Eleventh Circuit Court of Appeals in its judgment in this case has so far departed from accepted and usual courses of judicial analysis that this Court should exercise its power of supervision and hear this case.

The Eleventh Circuit justified its judgment by stating that the choice of law provision also adopted federal law, citing as authority dicta from the case of *Fidelity Savings and Loan Association v. de la Cuesta*, 458 U.S. 141, 157 (1982). It is axiomatic that as a general rule all existing applicable or relevant and valid statutes, ordinances and regulations and settled law of the land at the time a contract is made becomes a part of the contract and must be read into the contract. If this same logic had been adopted in *Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University*,

supra, then the Federal Arbitration Act would have preempted the California statute. In the case a bar, the issue here is whether or not this contract is to be a contract made pursuant to the Georgia Motor Vehicle Finance Act, O.C.G.A. §10-1-30, et. seq., or one made pursuant to DIDMCA. If the logic adopted by the Eleventh Circuit were employed, then every mobile home contract would be a DIDMCA contract. However, it is obvious that Congress did not intend for DIDMCA to be an absolute federal preemption.[4]

In *Quiller, et al. v. Barclays American/ Credit*, Inc., 727 F.2d 1067 (11th Cir. 1984), reinstated en banc, 764 F.2d 1400 (1985), cert. denied, 476 U.S. 1124, 90 L.Ed.2d 673 (1986), the Eleventh Circuit Court of Appeals split along solid philosophical lines, holding that the Quiller contract was not entitled to

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[4]Congress has passed laws similar to DIDMCA in other areas dealing with state usury laws. See 12 U.S.C. §3801, where the terms of the mortgage are determinative of whether the instrument is an alternative mortgage preempted from State usury laws.

federal preemption because the finance company retained rights inconsistent with DIDMCA, but rejected the argument that the contract language itself had specifically to grant to the consumer a right to a 30 day notice of default and 30 days in which to cure the default,[5] a contractual provision very similar to that being utilized in the conventional mortgages, deeds of trust, or security deeds, on forms that have been approved by the FHLMC and the FNMA. The dissent, en banc, rather than following the Doctrine of Federalism which, if philosophically applied, would require a narrow reading of federal preemption in favor of state regulation, yielded to a laissez-faire philosophy that allows a financial institution to draft a contract in such as way that after the fact, it and it

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[5]In light of the fact that under Article 9, Section 503 of the Uniform Commercial Code, creditors have the right to repossess without notice unless otherwise agreed, petitioners believe that the terms and conditions of the contract must restrict that right if the contract is to be preempted by DIDMCA.

alone can elect to call its contract a DIDMCA contract or a contract governed by state law, depending upon the issues involved at that time.

In a companion case, *Grant v. General Electric Credit Corporation,* 727 F.2d 1073, reversed en banc, 764 F.2d 1404 (1985), cert. denied., 476 U.S. 1124, 90 L.Ed.2d 673 (1986), the panel initially held that the GECC form contracts involved in that case (a form different from the ones involved in this case) was not entitled to preemption. However, en banc the Eleventh Circuit reversed. There was not at that time nor is there now any logical basis for *Grant, supra,* and *Quiller, supra,* being decided differently. Courts should not strain to find federal preemption of state laws, especially in an area where Congress has specifically not preempted all state regulation and has left the issue as to whether state law is to be preempted in the hands of the drafters of contracts of adhesion. It would have been a simple matter for the drafters of any of the

mobile home contracts in question to copy the language contained in uniform forms approved by the FHLMC and the FNMA or simply to restate the language used in 12 C.F.R. §590.4(h).

Subsequent to *Grant, supra*, and *Quiller, supra*, the rights of consumers under other mobile home contracts have generally been determined not so much by the plain language involved but by a contest between the application of the doctrine of federalism or the application of a laissez-faire philosophy. Compare *Doyle, et al. v. Southern Guaranty Corporation*, 795 F.2d 907 (11th Cir. 1986) at 911, Note 7., cert. denied, ___ U.S. ___, 98 L.Ed.2d 49 (1987), where *Quiller, supra*, and the Doctrine of Federalism prevailed with *Moyer, et al. v. Citicorp Homeowners, Inc.*, 799 F.2d 1445 (11th Cir. 1986), where a laissez-faire philosophy resulted in a strained construction of the Uniform Commercial Code in

order to favor federal preemption.[6]

In *Quiller, supra,* this Court allowed the United States of America to file an amicus brief in which, because of perceived economic harm to finance companies, the United States of America urged that this Court grant certiorari. The truth about the economic issues are that mobile home consumers are paying the highest long-term financing rates for housing than any other segment of society and the collateral for these loans is depreciating substantially faster than the

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[6]See, *Moyer, supra,* at 1450, Note 17, where the Court sought to justify its position that the Harrison and Sanders contracts were federal preemption contracts, holding that it was an overstatement to say that Article 9, Section 503, of the Uniform Commercial Code required notice prior to foreclosure. Article 9, Section 503 of the Uniform Commercial Code does not require notice but, the parties must "otherwise agree" in order for a consumer to be given a right to notice before foreclosure or repossession. See, *Ford Motor Credit Co. v. Hunt,* 241 Ga. 342, 245 S.E.2d 295 (1978). Unless the contract specifically restricts the application of Article 9, Section 503 of the Uniform Commercial Code consistent with 12 C.F.R. §590.4(h), the contract would allow actions inconsistent with the rights to be granted consumers under a contract where the DIDMCA preemption applied.

principal debt is being retired.[7] The legality or illegality of these high finance charges should not be decided based on perceived or real economic considerations to consumers or finance companies, nor should they be decided by the adoption of a presumption in favor of federal preemption or a laissez-faire philosophy that allows a financial institution to draft contracts in such a way that, after the fact, it and it alone can elect to call its contracts DIDMCA contracts or contracts governed by state law.

Currently, in the deregulation mania, the trend has been to deregulate historical state usury laws. State usury laws came about not by accident but from man's experiences in regulating man's treatment of his fellow man. Aristotle condemned interest as an unnatural

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[7]Free market principles are not applicable in mobile home financing in that financing is prearranged and is incidental to the purchase. There is no real competitive shopping for financing in mobile home credit sale transactions as opposed to the competitive financing involved in conventional home financing.

breeding of money by money. Aristotle, *Politics,* I, 10. Restrictions on lending money can be found in Deuteronomy 23:20, Exodus 22:25-27 and Leviticus 25:35-37, in the Talmud Baba Metzia V, 1-2, II, and in the Koran. In Roman times, the Twelve Tables had forbidden interest above 8.33% per annum with the rate being lowered to 5% in 347 A.D., and to 0% in 342 A.D., Tactius, *Annals,* VI, 16. Even Adam Smith in *Wealth of Nations,* Chapter VI, "Of Stock Lent at Interest," approved of laws fixing the highest rate that could be charged for the use of money. The issue here is not whether one approves of the historical basis for laws fixing interest rates or whether one approves of the current trend of deregulation, but rather whether state laws are going to be presumed preempted in light of the limited nature of the preemption afforded mobile home financiers under DIDMCA.

The issues in this case should be decided by the terms of the contract as expressed in the contract drafted by GECC.

Conclusion

In this case, the Eleventh Circuit has completely overlooked the salutary principles of federalism, the presumption against federal preemption and the legal principle that courts should not legislate. If federal preemption schemes are to be based on the unilateral actions of drafters of contracts, then federal preemption should not be presumed and "intent" as to nature of the instrument should be decided by the clear language employed.

Respectfully submitted,

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APPENDIX A

JOHN T. ATKINSON, Jr., Marie Atkinson, Homer L. Ogden, Plaintiffs-Appellants

v.

GENERAL ELECTRIC CREDIT CORP. Defendant-Appellee

No. 87-8869

United States Court of Appeals, Eleventh Circuit

Feb. 21, 1989.

Before TJOFLAT and KRAVITCH, Circuit Judges, and PAINE*, District Judge

PER CURIAM:

On October 12, 1982, John and Marie Atkinson, the appellants, entered into a retail installment contract to purchase a new mobile home from Herli Homes, Inc. in Augusta, Georgia. The contract was written on a form provided by General Electric Credit Corp. (GECC), the appellee, and was subsequently assigned by Herli Homes to GECC. The contract provided for finance charges at a rate

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*Honorable James C. Paine, U.S. District Judge for the Southern District of Florida, sitting by designation.

exceeding that allowed by the Georgia Motor Vehicle Sales Finance Act. Ga.Code Ann. § 10-1-33 (1982). The charges were, however, within the rate allowed under the Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDMCA), Pub.L. No. 96-221, § 501(c), 94 Stat. 132, 162 (codified at 12 U.S.C. § 1735f-7 (1982). DIDMCA expressly preempts all state laws that limit the interest rate chargeable in connection with loans creating first liens on residential real property and mobile homes, provided the terms and conditions of the loans comply with regulations promulgated by the Federal Home Loan Bank Board (FHLBB). *See Moyer v. Citicorp Homeowners, Inc.*, 799 F.2d 1445, 1446 (11th Cir.1986).

On May 4, 1987, the Atkinsons brought this suit against GECC. In their complaint, they alleged that the terms and conditions of their contract with Herli Homes did not comply with an FHLBB regulation, specifically 12 C.F.R. § 590.4(h) (1988), which provides that "no action

to repossess or foreclose, or to accelerate payment of the entire outstanding balance of the obligation, may be taken against the debtor until 30 days after the creditor sends the debtor a notice of default"; the Atkinsons therefore asked the court to declare the contract interest rate usurious under Georgia law.[2] GECC moved to dismiss the complaint on the ground that the contract complied with the

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[2]The Atkinsons' complaint contained three counts. The first count, which invoked the district court's diversity jurisdiction, sought class action relief--principally the forfeiture of all finance charges paid, or to be paid, to GECC--on behalf of persons who purchased mobile homes in Georgia pursuant to the same form contract the Atkinsons had signed. The second count, which invoked the court's federal question jurisdiction, sought relief for the same class under the Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. § 1961 *et seq.* (1982) & Supp. IV 1986), by charging excessive finance charges in violation of 18 U.S.C. §§ 1341, 1343 (1982). The third count, which replicated count one, sought relief under state law on behalf of those who bought mobile homes in other states pursuant to the same GECC form contract. The district court dismissed the case without certifying a class with respect to any of these counts. The court's failure to certify is not an issue in this appeal, nor it its dismissal of counts two and three. This opinion therefore addresses only the sufficiency of the count one claim brought by the Atkinsons.

requirements of 12 C.F.R. § 590.4(h). The district court granted GECC's motion and dismissed the complaint. The Atkinsons now appeal. We affirm.

I.

As noted, state usury laws are preempted under DIDMCA when the contract meets the requirements of the FHLBB's regulations. Stated another way, the question is whether the "financing agreement contains express provisions authorizing conduct *contrary* to the . . . regulations." *Quiller v. Barclays American/Credit, Inc.*, 727 F.2d 1067, 1071 (11th Cir.) (emphasis in original), *reh'g en banc granted*, 727 F.2d 1072 (1984), *reinstated en banc*, 764 F.2d 1400 (1985), *cert. denied*, 476 U.S. 1124, 106 S.Ct. 1993, 90 L.Ed.2d 673 (1986).

We have addressed this question in the context of section 590.4(h)'s notice of default and right to cure requirement in three cases. In *Quiller*, we held that the contract did not qualify for preemption because it expressly

foreclosed the giving of notice.[3] At the same time, we pointed out that to satisfy section 590.4(h), the contract did not have to "contain an express term guaranteeing the debtor thirty days notice before repossession or foreclosure." *Id.* at 1071. In *Grant v. General Electric Credit Corp.*, 764 F.2d 1404 (11th Cir.1985) (en banc), we held that contract language specifying that "Buyer shall be given notice of right to cure default before Seller is permitted to exercise that right" was sufficient to establish preemption. *Id.* at 1406. Similarly, in *Moyer v. Citicorp Homeowners, Inc.*, 799 F.2d 1445 (11th Cir.1986), we found preemption even though the contract did not expressly provide for notice but only that the creditor's rights were

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[3]The contract provided as follows: the full balance may, upon election of the Holder, without notice, subject to any notice of right to cure, become due and payable . . .and Holder may, without notice or demand for performance or legal process, peaceably enter any premises . . .where the Collateral may be found, [and] peaceably take possession of it.
Quiller, 727 F.2d at 1071-72.

"Subject to Buyer's Right to Notice of Default and Right to Cure such default, *if any*." *Id.* at 1450 (emphasis added).

II

Interpretation of the disputed contract language in this case is more complex than in *Quiller*, *Grant*, and *Moyer* because two separate contract provisions are involved. The first states that:

> Should Buyer fail to make payment when due or otherwise fail to perform any obligation or covenant under this contract, Seller may pursue any rights and remedies available to Seller under the law to include repossession and or acceleration of Buyer's indebtedness hereunder, provided that Buyer shall be given a notice of right to cure the default if required by applicable law, before Seller may exercise such right.

The second provision, a choice-of-law clause, which is separated from the first provision by several unrelated terms and conditions, states:

> GOVERNING LAW: Buyer and Seller agree that construction and interpretation of the provisions hereof will be governed by the laws of the State of Georgia.

The language of the first provision appears to be indistinguishable from the challenged language in *Moyer*. The language here qualified the buyer's right to notice by the phrase "if required by applicable law"; the language in *Moyer* similarly qualifies the buyer's right to notice by the phrase "if any." Appellants argue, however, that because of the second provision, which states that Georgia law governs the construction and interpretation of the contract, the "applicable law" referred to in the first provision must be Georgia law as opposed to federal law--specifically, 12 C.F.R. § 590.4(h). Since Georgia law requires no notice for self-help repossession and only seven days' notice for judicial repossession, the appellants argue that the contract authorizes conduct contrary to the thirty-day notice requirement of section 590.4(h).

[1] We believe that such a reading of the contract is misleading. Because the seller of the mobile home intended to charge appellants an interest rate that would be permissible

under DIDMCA preemption, a more reasonable interpretation of the contract is that the choice-of-law provision was intended to govern contract matters not covered by DIDMCA. As the Supreme Court has observed, providing that a contract is to be governed by "state law does not signify the inapplicability of federal law, for 'a fundamental principal in our system of complex national polity' mandates that 'the Constitution, laws, and treaties of the United States are as much a part of the law of every State as its own local laws and Constitution.'" *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta,* 458 U.S. 141, 157, 102 S.Ct. 3014, 3024, 73 L.Ed.2d 664 (1982) (quoting *Hauenstein v. Lynham,* 100 U.S. 483, 490, 25 L.Ed. 628 (1879)). Accordingly, in the case before us, the parties' choice of Georgia law to provide the rules of contract construction did not automatically bar the application of federal law.

[2] It is readily apparent that the parties intended that DIDMCA apply, so to permit the

seller, and subsequently GECC, to charge a higher rate of interest. The question then becomes whether the contract's notice of default and right to cure provision and its choice-of-law clause, taken together, can be deemed contrary to section 590.4(h)'s requirements, so as to foreclose DIDMCA preemption. We conclude that they cannot.

The notice provision plainly meets section 590.4(h)'s requirement because it makes the seller give the buyers notice of their right to cure a default as a condition precedent to repossession or acceleration of the indebtedness--"if required by applicable law." Section 590.4(h), the applicable law, does not mandate that a financing agreement specify the precise notice to be given; in fact, in some circumstances, section 590.4(h) allows a creditor to repossess or accelerate the indebtedness without giving any notice.[4]

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[4]Under section 590.4(h), in the case of abandonment or other extreme circumstances, or where the buyer has already had two notices of default within a one-year period, 30 day's notice to the buyer with a right to cure is not

In addition, no inconsistency exists in applying both DIDMCA and Georgia law. Since Georgia law includes federal law, as long as the FHLBB regulations are met, DIDMCA should apply to those aspects of the contract it addresses. The situation in this case is similar to that in *Moyer*. In *Moyer*, we construed a contract which stated that a creditor's rights were "subject to buyer's Right to Notice of Default and Right to Cure such default, if any," followed immediately by a statement that the seller had all the remedies of a secured party under the Uniform Commercial Code, under which five days' notice was sufficient. We concluded that such a provision was not contrary to section 590.4(h) because the Uniform Commercial Code spoke only to procedures to be followed *after* seizure had taken place, while the FHLBB regulation went to notice *prior* to foreclosure. *Moyer*, 799

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required before repossession or acceleration of the indebtedness.

F.2d at 1450.

Similarly, in this case, the two provisions are not contradictory since the choice-of-law clause was intended to govern all matters not covered by the federal law. In fact, the FHLBB regulations acknowledge that they do not cover many aspects of the contract and that these should be governed by state law. See 12 C.F.R. § 590.4(b)(2)(i)(A) (1988).

Since no contradiction exists between the FHLBB regulations and the application of the Georgia law under the choice-of-law clause, DIDMCA applies and the interest rate is not usurious. The judgment of the district court is, therefore,

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 87-8869

JOHN T. ATKINSON, JR.,
MARIE ATKINSON,
HOMER L. OGDEN,

Plaintiffs-Appellants,

versus

GENERAL ELECTRIC CREDIT CORP.,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Georgia

ON PETITION(S) FOR REHEARING
(March 27, 1989)

BEFORE: TJOFLAT and KRAVITCH, Circuit Judges, and PAINE*, District Judge.

PER CURIAM:

The petition(s) for rehearing filed by appellants, John T. Atkinson, Jr., et al. is *denied*.

ENTERED FOR THE COURT:

_____
United States Circuit Judge

*Honorable James C. Paine, U.S. District Judge for the Southern District of Florida, sitting by designation.

APPENDIX B

12 U.S.C. §1735F-7 (Note)

"(a)(1) The provisions of the constitution or the laws of any State expressly limiting the rate or amount of interest, discount points, finance charges, or other charges which may be charged, taken, received, or reserved shall not apply to any loan, mortgage, credit sale, or advance which is --

"(A) secured by a first lien on residential real property, by a first lien on stock in a residential cooperative housing corporation where the loan, mortgage, or advance is used to finance the acquisition of such stock, or by a first lien on a residential manufactured home;

"(B) made after March 31, 1980; and

"(C) described in section 527(b) of the National Housing Act (12 U.S.C. 1735f-5(b)) [section 1735f-5(b) of this title], except that for the purpose of this section --

"(i) the limitation described in section 527(b)(1) of such Act [section 1735f-5(b)(1) of this title] that the property must be designed principally for the occupancy of from one to four families shall not apply;

"(ii) the requirement contained in section 527(b)(1) of such Act [section 1735f-5(b)(1) of this title] that the loan be secured by residential real property shall not apply to a loan secured by stock in a residential cooperative housing corporation nor to a loan or credit sale secured by a first lien on a residential manufactured home;

"(iii) the term 'federally related mortgage loan' in section 527(b) of such Act [section 1735f-5(b) of this title] shall include a credit sale which is secured by a first lien on a residential manufactured home and which otherwise

meets the definitional requirements of section 527(b) of such Act [section 1735f-5(b) of this title], as those requirements are modified by this section;

"(iv) the term 'residential loans' in section 527(b)(2)(D) of such Act [section 1735f-5(b)(2)(D) of this title] shall also include loans or credit sales secured by a first lien on a residential manufactured home;

"(v) the requirement contained in section 527(b)(2)(D) of such Act [section 1735f-5(b)(2)(D) of this title] that a creditor make or invest in loans aggregating more than $1,000,000 per year shall not apply to a creditor selling residential manufactured homes financed by loans or credit sales secured by first liens on residential manufactured homes if the creditor has an

arrangement to sell such loans or credit sales in whole or in part, or if such loans or credit sales are sold in whole or in part to a lender, institution, or creditor described in section 527(b) of such Act [section 1735f-5(b) of this title] or in this section or a creditor, as defined in section 103(f) of the Truth in Lending Act [section 1602(f) of Title 15, Commerce and Trade], as such section was in effect on the day preceding the date of enactment of this title [Mar. 31, 1980], if such creditor makes or invests in residential real estate loans or loans or credit sales secured by first liens on residential manufactured homes aggregating more than $1,000,000 per year; and

"(vi) the term 'lender' in section 527(b)(2)(A) of such Act [section 1735f-5(b)(2)(A) of this

title] shall also be deemed to include any lender approved by the Secretary of Housing and Urban Development for participation in any mortgage insurance program under the National Housing Act [this chapter].

"(2)(A) The provisions of the constitution or law of any State expressly limiting the rate or amount of interest which may be charged, taken, received, or reserved shall not apply to any deposit or account held by, or other obligation of a depository institution. For purposes of this paragraph, the term 'depository institution' means --

"(i) any insured bank as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813) [section 1813 of this title];

"(ii) any mutual savings bank as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813) [section 1813 of this title];

"(iii) any savings bank as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813) [section 1813 of this title];

"(iv) any insured credit union as defined in section 101 of the Federal Credit Union Act (12 U.S.C. 1752) [section 1752 of this title];

"(v) any member as defined in section 2 of the Federal Home Loan Bank Act (12 U.S.C. 1422) [section 1422 of this title]; and

"(vi) any insured institution as defined in section 408 of the National Housing Act (12 U.S.C. 1730a) [section 1730a of this title).

"(B) This paragraph shall not apply to any such deposit, account, or obligation which is payable only at an office of an insured bank, as defined in section 3 of the Federal Deposit Insurance Act [section 1813 of this title], located in the Commonwealth of Puerto Rico.

"(b)(1) Except as provided in paragraphs

(2) and (3), the provisions of subsection (a)(1) shall apply to any loan, mortgage, credit sale, or advance made in any State on or after April 1, 1980.

"(2) Except as provided in paragraph (3), the provisions of subsection (a)(1) shall not apply to any loan, mortgage, credit sale, or advance made in any State after the date (on or after April 1, 1980, and before April 1, 1983) on which such State adopts a law or certifies that the voters of such State have voted in favor of any provision, constitutional or otherwise, which states explicitly and by its terms that such State does not want the provisions of subsection (a)(1) to apply with respect to loans, mortgages, credit sales, and advances made in such State.

"(3) In any case in which a State takes an action described in paragraph (2), the provisions of subsection (a)(1) shall continue to apply to --

"(A) any loan, mortgage, credit sale, or advance which is made after the date

such action was taken pursuant to a commitment therefor which was entered during the period beginning on April 1, 1980, and ending on the date on which such State takes such action; and

"(B) any loan, mortgage, or advance which is a rollover of a loan, mortgage, or advance, as described in regulations of the Federal Home Loan Bank Board, which was made or committed to be made during the period beginning on April 1, 1980, and ending on the date on which such State takes any action described in paragraph (2).

"(4) At any time after the date of enactment of this Act [Mar. 31, 1980], any State may adopt a provision of law placing limitations on discount points or such other charges on any loan, mortgage, credit sale, or advance described in subsection (a)(1).

"(c) The provisions of subsection (a)(1) shall not apply to a loan, mortgage, credit sale, or advance which is secured by a first

lien on a residential manufactured home unless the terms and conditions relating to such loan, mortgage, credit sale, or advance comply with consumer protection provisions specified in regulations prescribed by the Federal Home Loan Bank Board. Such regulations shall --

"(1) include consumer protection provisions with respect to balloon payments, prepayment penalties, late charges, and deferral fees;

"(2) require a 30-day notice prior to instituting any action leading to repossession or foreclosure (except in the case of abandonment or other extreme circumstances);

"(3) require that upon prepayment in full, the debtor shall be entitled to a refund of the unearned portion of the precomputed finance charge in an amount not less than the amount which would be calculated by the actuarial method, except that the debtor shall not be entitled to a refund which is less than $1; and

"(4) include such other provisions as the Federal Home Loan Bank Board may prescribe after a finding that additional protections are required.

"(d) The provisions of subsection (c) shall not apply to a loan, mortgage, credit sale, or advance secured by a first lien on a residential manufactured home until regulations required to be issued pursuant to paragraphs (1), (2), and (3) of subsection (c) take effect, except that the provisions of subsection (c) shall apply in the case of such a loan, mortgage, credit sale, or advance made prior to the date on which such regulations take effect if the loan, mortgage, credit sale, or advance includes a precomputed finance charge and does not provide that, upon prepayment in full, the refund of the unearned portion of the precomputed finance charge is in an amount not less the amount which would be calculated by the actuarial method, except that the debtor shall not be entitled to a refund which is less than $1. The Federal Home

Loan Bank Board shall issue regulations pursuant to the provisions of paragraphs (1), (2), and (3) of subsection (c) that shall take effect prospectively not less than 30 days after publication in the Federal Register and not later than 120 days from the date of enactment of this Act [Mar. 31, 1980].

"(e) For the purpose of this section --

"(1) a 'prepayment' occurs upon --

"(A) the refinancing or consolidation of the indebtedness;

"(B) the actual prepayment of the indebtedness by the consumer whether voluntarily or following acceleration of the payment obligation by the creditor; or

"(C) the entry of a judgment for the indebtedness in favor of the creditor;

"(2) the term 'actuarial method' means the method of allocating payments made on a debt between the outstanding balance of the obligation and the

precomputed finance charge pursuant to which a payment is applied first to the accrued precomputed finance charge and any remainder in subtracted from, or any deficiency is added to, the outstanding balance of the obligation;

"(3) the term 'precomputed finance charge' means interest or a time price differential within the meaning of sections 106(a)(1) and (2) of the Truth in Lending Act (15 U.S.C. 1605(a)(1) and (2)) [section 1605(a)(1) and (2) of Title 15, Commerce and Trade] as computed by an add-on or discount method; and

"(4) The term 'residential manufactured home' means a mobile home as defined in section 603(6) of the National Mobile Home Construction and Safety Standards Act of 1974 [section 5402(6) of Title 40, The Public Health and Welfare] which is used as a residence.

"(f) The Federal Home Loan Bank Board is authorized to issue rules and regulations and

to publish interpretations governing the implementation of this section.

"(g) This section takes effect on April 1, 1980."

APPENDIX C

§ 590.4 Consumer protection rules for federally-related loans, mortgages, credit sales and advances secured by first liens on residential mobile homes.

(a) *Definitions.* As used in this section:

(1) *Prepayment.* A "prepayment" occurs upon--

(i) Refinancing or consolidation of the indebtedness;

(ii) Actual prepayment of the indebtedness by the debtor, whether voluntarily or following acceleration of the payment obligation by the creditor; or

(iii) The entry of a judgment for the indebtedness in favor of the creditor.

(2) *Actuarial method.* The term "actuarial method" means the method of allocating payments made on a debt between the outstanding balance of the obligation and the finance charge pursuant to which a payment is applied first to the accumulated finance charge and any

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remainder is subtracted from, or any deficiency is added to, the outstanding balance of the obligation.

(3) *Precomputed Finance Charge.* The term "precomputed finance charge" means interest or a time/price differential as computed by the add-on or discount method. Precomputed finance charges do not include loan fees, points, finder's fees, or similar charges.

(4) *Creditor.* The term "creditor" means any entity covered by this part, including those which regularly extend or arrange for the extension of credit and assignees that are creditors under section 501(a)(1)(C)(v) of the Depository Institutions Deregulation and Monetary Control Act of 1980.

(b) *General.* (1) The provisions of the Constitution or the laws of any State expressly limiting the rate or amount of interest, discount points, finance charges, or other charges which may be charged, taken, received, or reserved shall not apply to any loan, mortgage, credit sale, or advance which is

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secured by a first lien on a residential mobile home if a creditor covered by this part complies with the consumer protection regulations of this section.

(2) *Relation to State Law.* (i) In making loans or credit sales subject to this section, creditors shall comply with state and Federal law in accordance with the following:

(A) *State law regulating matters not covered by this section.* When state law regulating matters not covered by this section is otherwise applicable to a loan or credit sale subject to this section, creditors shall comply with such state law provisions.

(B) *State law regulating matters covered by this section.* Creditors need comply only with the provisions of this section, unless the Board determines that an otherwise applicable state law regulating matters covered by this section provides greater protection to consumers. Such determinations shall be published in the FEDERAL REGISTER and shall operate prospectively.

(ii) Any interested party may petition the Board for a determination that state law requirements are more protective of consumers than the provisions of this section. Petitions shall be sent to: Secretary to the Board, Federal Home Loan Bank Board, 1700 G Street, NW., Washington, D.C. 20552, and shall include:

(A) A copy of the state law to be considered;

(B) Copies of any relevant judicial, regulatory, or administrative interpretations of the state law; and

(C) An opinion or memorandum from the state Attorney General or other appropriate state official having primary enforcement responsibilities for the subject state law provision, indicating how the state law to be considered offers greater protection to consumers than the Board's regulation.

(c) *Refund of precomputed finance charge.* In the event the entire indebtedness is prepaid, the unearned portion of the precomputed finance charge shall be refunded

to the debtor. This refund shall be in an amount not less than the amount which would be refunded if the unearned precomputed finance charge were calculated in accordance with the actuarial method, except that the debtor shall not be entitled to a refund which is less than one dollar. The unearned portion of the precomputed finance charge is, at the option of the creditor, either:

(1) That portion of the precomputed finance charge which is allocable to all unexpired payment periods as originally scheduled, or if deferred, as deferred. A payment period shall be deemed unexpired if prepayment is made within 15 days after the payment period's scheduled due date. The unearned precomputed finance charge is the total of that which would have been earned for each such period had the loan not been precomputed, by applying to unpaid balances of principal, according to the actuarial method, an annual percentage rate based on those charges which are considered precomputed finance charges in this section,

assuming that all payments were made as originally scheduled, or as deferred, if deferred. The creditor, at its option, may round this annual percentage rate to the nearest one-quarter of one percent; or

(2) The total precomputed finance charge less the earned precomputed finance charge. The earned precomputed finance charge shall be determined by applying an annual percentage rate based on the total precomputed finance charge (as that term is defined in this section), under the actuarial method, to the unpaid balances for the actual time those balances were unpaid up to the date of prepayment. If a late charge or deferral fee has been collected, it shall be treated as a payment.

(d) *Prepayment penalties.* A debtor may prepay in full or in part the unpaid balance of the loan at any time without penalty. The right to prepay shall be disclosed in the loan contract in type larger than that used for the body of the document.

(e) *Balloon payments*--(1) *Federal associations*. Federal association creditors may enter into agreements with debtors which provide for non-amortized and partially amortized loans on residential manufactured homes, and such loans shall be governed by the provisions of this section and § 545.33(f) of this chapter.

(2) *Other creditors*. All other creditors may enter into agreements with debtors which provide for non-amortized and partially-amortized loans on residential manufactured homes to the extent authorized by applicable Federal or state law or regulation.

(f) *Late charges*. (1) No late charge may be assessed, imposed, or collected unless provided for by written contract between the creditor and debtor.

(2) To the extent that applicable State law does not provide for a longer period of time, no late charge may be collected on an installment which is paid in full on or before the 15th day after its scheduled or deferred

due date even though an earlier maturing installment or a late charge on an earlier installment may not have been paid in full. For purposes of assessing late charges, payments received are deemed to be applied first to current installments.

(3) A late charge may be imposed only once on an installment; however, no such charge may be collected for a late installment which has been deferred.

(4) To the extent that applicable State law does not provide for a lower charge or longer grace period, a late charge on any installment not paid in full on or before the 15th day after its scheduled or deferred due date may not exceed the lesser of $5.00 or five percent of the unpaid amount of the installment.

(5) If, at any time after imposition of a late charge, the lender provides the borrower with written notice regarding amounts claimed to be due but unpaid, the notice shall separately state the total of all late charges claimed.

(6) Interest after the final scheduled maturity date may not exceed the maximum rate otherwise allowable under State law for such contract, and if such interest is charged, no separate late charge may be made on the final scheduled installment.

(g) *Deferral fees.* (1) With respect to mobile home credit transactions containing precomputed finance charges, agreements providing for deferral of all or part of one or more installments shall be in writing, signed by the parties, and

(i) Provide, to the extent that applicable state law does not provide for a lower charge, for a charge not exceeding one percent of each installment or part thereof for each month from the date when such installment was due to the date when it is agreed to become payable and proportionately for a part of each month, counting each day as 1/30th of a month;

(ii) Incorporate by reference the transaction to which the deferral applied;

(iii) Disclose each installment or part

thereof in the amount to be deferred, the date or dates originally payable, and the date or dates agreed to become payable; and

(iv) Set forth the fact of the deferral charge, the dollar amount of the charge for each installment to be deferred, and the total dollar amount to be paid by the debtor for the privilege of deferring payment.

(2) No term of a writing executed by the debtor shall constitute authority for a creditor unilaterally to grant a deferral with respect to which a charge is to be imposed or collected.

(3) The deferral period is that period of time in which no payment is required or made by reason of the deferral.

(4) Payments received with respect to deferred installments shall be deemed to be applied first to deferred installments.

(5) A charge may not be collected for the deferral of an installment or any part thereof if, with respect to that installment, a refinancing or consolidation agreement is

concluded by the parties, or a late charge has been imposed or collected, unless such late charge is refunded to the borrower or credited to the deferral charge.

(h) *Notice before repossession, foreclosure, or acceleration.* (1) Except in the case of abandonment or other extreme circumstances, no action to repossess or foreclose, or to accelerate payment of the entire outstanding balance of the obligation, may be taken against the debtor until 30 days after the creditor sends the debtor a notice of default in the form set forth in paragraph (h)(2) of this section. Such notice shall be sent by registered or certified mail with return receipt requested. In the case of default on payments, the sum stated in the notice may only include payments in default and applicable late or deferral charges. If the debtor cures the default within 30 days of the postmark of the notice and subsequently defaults a second time, the creditor shall again give notice as described above. The debtor is not entitled

to notice of default more than twice in any one-year period.

(2) The notice in the following form shall state the nature of the default, the action the debtor must take to cure the default, the creditor's intended actions upon failure of the debtor to cure the default, and the debtor's right to redeem under state law.

TO:_____

DATE: _____, 19 _____

_____

_____

NOTICE OF DEFAULT AND RIGHT TO CURE

DEFAULT

Name, address, and telephone number of creditor_____

Account number, if any _____

Brief identification of credit transaction____

_____

You are now in default on this credit transaction. You have a right to correct this default within 30 days from the postmarked date of this notice.

If you correct the default, you may continue with the contract as though you did not default. Your default consists of: _____

Describe default alleged _____

_____

Cure of default: Within 30 days from the postmarked date of this notice, you may cure your default by (describe the acts necessary for cure, including, if applicable, the amount of payment required, including itemized delinquency or deferral charges).

_____

_____

Creditor's rights: If you do not correct your default in the time allowed, we may exercise our rights against you under the law by (describe action creditor intends to take.)

_____

If you have any questions, write (the creditor) _____ at the above address or cal (creditor's designated employee) _____ a (telephone number) _____ between the hours o _____ and _____ on (state days of week

_____.

If this default was caused by your failure to make a payment or payments, and you want to pay by mail, please send a check or money order; do not send cash.

(Sec. 5, 48 Stat. 132, as amended (12 U.S.C. 1464); sec. 341, 96 Stat. 1469, 1505-1507; Reorg. Plan No. 3 of 1947, 3 CFR, 1943-48 Comp., p.1071)

[45 FR 43686, June 30, 1980, as amended at 45 FR 46341, July 10, 1980; 45 FR 50556, July 30, 1980; 48 FR 21561, May 13, 1983]

APPENDIX D

Atkinson Mobile Home
Retail Installment Contract

THE TERMS OF THIS CONTRACT ARE ON BOTH SIDES OF THIS PAGE

RETAIL INSTALLMENT CONTRACT
SECURITY AGREEMENT

Name(s) *John T. Jr. & S. Marie Atkinson*
Homer L. Ogden

ADDRESS OF BUYER
Address *301 Barbara Road*
City *Augusta* County *Richmond*
State *GA* Zip Code *30906*

SOCIAL SECURITY NO.
258 75 8285
257 17 6890
254 20 5421

FOR OFFICE USE ONLY
Office No.
Dealer No. Acct.No.

Proposed location of Manufactured Home *4255-E Helmly Dr., Hephzibah, GA. 30815*

Tel. No. *793-4080*

As used herein, "Buyer" means all persons who sign this contract as buyer or co-buyer, jointly and severally, and "Seller" means the seller named below.

In consideration of the following time sale purchase, Buyer promises to pay Seller the

Total of Payments shown below in accordance with the payment schedule shown below. Buyer has, as of the date of this contract, purchased from Seller on a time sale basis under the terms stated herein, and received and accepted in its present condition the following described manufactured home together with the furnishings, equipment, appliances and accessories included in the manufactured home at the time of purchase (all hereinafter called Manufactured Home):

Description of Manufactured Home New X Used_

TRADE NAME Darlington
YEAR 1982 MODEL Charmer
LENGTH 60 WIDTH 14
SERIAL NO. 5614 D 1596
SERIAL NO. _____

ADDITIONAL ACCESSORIES AND FURNISHINGS

Item	Serial #	Item	Serial #
Washer			
Dryer			

The Seller has made the Truth in Lending disclosures contained in this contract unless another party is identified here:_____

ITEMIZATION OF AMOUNT FINANCED:

1. Cash Price (including sales tax of $602) $15,652.00

   Cash Downpayment $1,561.00

   Trade In (Year, Make, Model_____)
   Length_____ Width_____
   Gross Value $_____ Liens $_____
   (Seller to pay off)

   Net Trade In Value $_____

2. Total Downpayment $ 1,561.00

3. Unpaid Balance of Cash Price $14,091.00

4. Amount paid to others on your behalf

   a. To Insurance Companies

      (1) Property Insurance
      Broad Form / Comprehensive $_____ Expiration Date _____

      Mobile Homeowners $305.00 Expiration Date 10-12-83

      (2) Credit Life Insurance $_____

   b. To Public Officials

      (1) License Fee $_____

      (2) Registration $_____

      (3) Lien Notation Fees $_____

      (4) Certificate of Title $_____

(5) Tags $_____

(6) Filing Fees $_____

c. To_____ $_____
(insert name and description)

d. To_____ $_____
(insert name and description)

Total (a, b, c, d) $ *305.00*

5. Unpaid Balance (3 plus 4) $*14,396.00*

6. Prepaid Finance Charge $ *-0-*

7. Amount Financed (5 minus 6) $*14,396.00*

INSURANCE

CREDIT LIFE INSURANCE OPTION: Credit Life Insurance is not required as a condition of the extension of credit by Seller and will not be provided unless (1) the name and age of the proposed insured are entered here:

Proposed insured_____ Age_____

and (2) Buyer's election of such insurance and its cost is shown by Buyer's initialing below.

Term	Premium	Election
		I want Credit Life
	$	Insurance

Initials _____

If Buyer has elected to obtain this insurance, it will be decreasing term life insurance on the life of the Proposed Insured (initial coverage in the amount of the Total of Payments hereunder or, if less, in the amount of $_____); decreasing in coverage in either case in equal monthly increments over the term of the policy. Any application for credit life insurance is subject to the insurer's acceptance and approval.

PROPERTY INSURANCE: Buyer is required to have and maintain, at Buyer's expense, insurance against physical damage to the Manufactured Home for the term of this contract, with a loss payable clause protecting lienholder (as interest may appear) with provision for 10 day notice of cancellation to lienholder (minimum coverage--Broad Form Comprehensive in an amount equal to the actual cash value of the Manufactured Home and including, if the

Manufactured Home is to be located in a designated hazardous flood zone, flood insurance coverage (if required by Federal Law). Buyer has the right to obtain such insurance through any person of Buyer's choice as well as through Seller. The cost of this required insurance and any other property or liability insurance elected by Buyer for the term(s) disclosed in Item 4a(1), if procured through Seller is *$305.00*. Buyer's election to obtain such insurance through Seller is shown by the inclusion of this cost in Item 4a(1). Additional insurance policies will be required to be purchased or furnished by Buyer, at Buyer's expense, if policies being purchased or provided for expire or are cancelled prior to payment in full of this contract. Should Buyer fail initially to provide required insurance, Seller may, but shall not be obligated to, procure such insurance on Buyer's behalf. If Buyer has provided insurance satisfying the minimum coverage requirements hereunder, but such insurance expires or is

otherwise terminated, Seller may, but shall not be obligated to, procure on Buyer's behalf coverage as nearly comparable as is available to that insurance which has expired or been terminated. In either event, the cost thereof plus interest at the highest lawful contract rate will be added to the Buyer's indebtedness hereunder.

ANNUAL PERCENTAGE RATE The cost of your credit as a yearly rate:	**FINANCE CHARGE** The dollar amount the credit will cost you:
19.18 %	$ *29,552.80*

Amount Financed (#7 above)	**Total of Payments** (fin.chgs. & amt. fin.)
The amount of credit provided to you or your behalf:	The amount you will have paid after you on have made all payments as scheduled:
$ *14,396.00*	$ *43,948.80*

Total Sale Price
(#2, #5 & fin. chgs.)

The total cost of
your purchase on
credit including
your down payment of

$ *1,561.00*
$ *45,509.80*

Your payment schedule will be:

Number of Payments	Amount of Payments
180	*24.16*

When Payments Are Due

Monthly, beginning *November 25th, 1982*

Security: You are giving a security interest in:

X the goods or property being purchased

_____ real property located at: _____

Late Charge: If a payment is more than 15 days late, you will be charged 5% of the unpaid amount of such payment not to exceed $5.00.

Prepayment: If you pay off early you may be entitled to a refund of part of the finance charge.

Assumption: Someone buying your manufactured home may, under certain circumstances, be allowed to assume the remainder of the contract on the original terms.

See contract terms below and on reverse side for additional information about nonpayment,

default, required repayment in full before the scheduled date and prepayment refunds.

UNLESS CHECKED HERE ___: LIABILITY INSURANCE FOR BODILY INJURY AND PROPERTY DAMAGE CAUSED TO OTHERS IS NOT INCLUDED.

NOTICE TO THE BUYER: Do not sign this contract before you read it or if it contains blank spaces. you are entitled to an exact copy of the contract you sign.

BUYER ACKNOWLEDGES RECEIPT OF A TRUE COPY OF THIS RETAIL INSTALLMENT CONTRACT.

John L. Atkinson
S. Marie Atkinson
(Signature of Buyer)
Homer L. Ogden
(Signature of Co-Buyer)

Lot D-2, 1947 Gordon Hwy.
Augusta, GA. 30908
(Address of Co-Buyer)

Date 10/12 1982.

HERRLI

Herrli Homes Inc.
Seller

By Charles Simpson Pres.
(Signature) (Title)

Seller's
Address Augusta, GA 30904

GA8207MHFH DUPLICATE--For Buyer

CATALOG ORDER #450442

ADDITIONAL TERMS AND CONDITIONS

SECURITY INTEREST: Buyer hereby grants Seller a security interest in (1) the Manufactured Home and in all goods that are or may hereafter by operation of law become accessions thereto and (2) all proceeds of such property. This security interest secures payment and

performance of Buyer's obligations under this contract, including any indebtedness subsequently arising because of Buyer's failure to perform such obligations and including any extensions, renewals or modifications hereof.

PREPAYMENT: Buyer my prepay this contract in full or in part at any time without penalty. In such event, Buyer will receive a refund of the unearned portion of the finance charge calculated by the Actuarial Method. Buyer agrees that no portion of the prepaid finance charge will be refunded.

DELINQUENCY & DEFAULT: Time is of the essence hereof. Buyer agrees to pay as a delinquency charge on each payment which is more than 15 days late, 5% of the unpaid amount of such payment, not to exceed $5.00. Should Buyer fail to make payment when due or otherwise fail to perform any obligation or covenant under this contract, Seller may pursue any rights and remedies available to Seller under the law to

include repossession and or acceleration of Buyer's indebtedness hereunder, provided that Buyer shall be given a notice of right to cure the default if required by applicable law, before Seller may exercise such right. In the event of acceleration due to Buyer's default, Buyer will receive a refund credit of the unearned finance charge calculated by the Actuarial Method. No refund credit will be given for any portion of the prepaid finance charge. Any personal property of Buyer in or attached to the Manufactured Home which is not subject to Seller's security interest may be held by Seller without liability if the Manufactured Home is repossessed. Buyer shall be deemed to have waived any claim thereto unless written demand by certified mail is made upon Seller within 10 days after repossession. In the event Buyer's obligation is referred for collection to an attorney who is not a salaried employee of Seller, Buyer agrees to pay in addition to all other sums due and owing hereunder, reasonable attorney's fees and court

costs.

ADDITIONAL COVENANTS: Buyer agrees: (a) not to remove the Manufactured Home from the address designated herein unless Buyer first notifies Seller and receives Seller's written consent; (b) not to sell the Manufactured Home without first obtaining Seller's written consent; (c) that the Manufactured Home shall remain personal property and not become part of the freehold; (d) not to encumber or abandon the Manufactured Home or use it for hire or illegally; (e) to maintain the Manufactured Home in good condition until such time as Buyer's obligations under this contract have been satisfied in full; and (f) to pay promptly all liens and encumbrances imposed upon the Manufactured Home and for its use. Should Buyer fail to promptly pay any such lien, or encumbrance, Seller may do so on Buyer's behalf. In such event, Buyer will immediately reimburse Seller for the cost thereof, or such cost plus interest at the highest lawful

contract rate will be added to Buyer's indebtedness hereunder.

CREDIT INFORMATION: Buyer hereby authorizes Seller to investigate the Buyer's credit worthiness and credit capacity in connection with the establishment, maintenance and collection of Buyer's account and to furnish information concerning the Buyer and the Buyer's account to credit reporting agencies. Buyer further authorizes Seller to sell or otherwise furnish such information, including insurance information, to all others who may lawfully receive such information for their own use, sale, or such other purposes as they deem appropriate.

ASSIGNMENT: Seller may assign this contract to any person or entity. All rights granted to Seller under this contract will apply to any assignee of this contract. If Seller assigns this contract, Seller shall not be assignee's agent for any purpose.

WAIVER: Waiver of any default shall not constitute a waiver of any other default. No provision shall be modified, changed, or altered unless in writing and executed by an officer of the Seller. This contract constitutes the entire agreement between the parties and Buyer agrees that no representations, oral or implied, have been made to Buyer to induce Buyer to enter into this contract other than those expressly set forth herein.

GOVERNING LAW: Buyer and Seller agree that construction and interpretation of the provisions hereof will be governed by the laws of the State of Georgia.

VALIDITY: Wherever possible each provision of this contract shall be interpreted in such manner as to be effective and valid under applicable law, but if any provision of this contract shall be prohibited by or be invalid

under applicable law, such provision shall be ineffective to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of this contract. This contract shall be of no effect until and unless signed by Seller and Buyer.

(See other side for Buyer's signature)

NOTICE

ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

~~88-1953~~

~~No. 88-1952~~

Supreme Court, U.S.
FILED
JUN 13 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

JOHN T. ATKINSON, JR., MARIE ATKINSON, HOMER L. OGDEN, and All Other Persons Similarly Situated,
Petitioners,

vs.

GENERAL ELECTRIC CAPITAL CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION

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BEST AVAILABLE COPY

1988

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QUESTION PRESENTED

Whether a retail installment contract that expressly conditions the creditor's right to repossess, accelerate or foreclose upon giving the debtor a notice of default and right to cure "if required by applicable law" affirmatively misrepresents the debtor's right to notice of default and right to cure under 12 C.F.R. § 590.4(h)?

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12 C.F.R. § 590.4 (1984) (cited herein as the "Regulations") ..... passim

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Racketeering Influenced Corrupt Organizations Act, 18 U.S.C. § 1961 2

No. 88-1952

In the Supreme Court of the United States

OCTOBER TERM, 1988

JOHN T. ATKINSON, JR., MARIE ATKINSON, HOMER L. OGDEN, and All Other Persons Similarly Situated,
Petitioners,

vs.

GENERAL ELECTRIC CAPITAL CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION

STATEMENT OF THE CASE

Petitioners filed an alleged class action on May 4, 1987 in the United States District Court for the Southern District of Georgia, Augusta Division, claiming that General Electric Capital Corporation ("GECC")[1] had assessed finance charges on Petitioners' mobile home financing contract (the "Contract") in excess of the maximum rate allowed by the Georgia Motor Vehicle Sales Finance Act.[2]

1. In compliance with Rule 28.1, GECC has listed its parent companies, non-wholly owned subsidiaries and affiliates in the Appendix hereto.

2. O.C.G.A. §§ 10-1-30 to -38 (1982) (the "Georgia Act").

(R1-1-5). The Complaint alleged that the finance charge restriction in the Georgia Act was not preempted by § 501 of the Depository Institutions Deregulation and Monetary Control Act of 1980, 12 U.S.C. § 1735f-7 note ("DIDMCA"), and the regulations promulgated thereunder by the Federal Home Loan Bank Board (the "Regulations")[3] because of the form of language in the Contract relating to the right to notice of default and right to cure. (R1-1-6). Another count in the Complaint sought recovery on behalf of a national class alleging that GECC similarly exceeded the maximum rates in other states. The Complaint also alleged that GECC was liable under the Racketeering Influenced Corrupt Organizations Act[4] for charging the allegedly excessive finance charges. (R1-1-8, 9). The Complaint sought forfeiture of all finance charges on behalf of Petitioners and the classes that they sought to represent and damages equal to twice the finance charge for the allegedly willful violation of the Georgia Act. (R1-1-11, 12, 13). All three counts rest on the contention that the Contract is not entitled to federal preemption under DIDMCA.

GECC moved for dismissal on the ground that the Contract form at issue is entitled to federal preemption under DIDMCA, the Regulations, and settled Eleventh Circuit case authority. The Contract fully protects the buyer's right under the Regulations to receive notice of default and right to cure, since it clearly informs the debtor that *before* GECC may exercise its right to repossess or accelerate, GECC must give the debtor a notice of right to cure the default if required by applicable law. The pertinent sentence in the Contract reads:

---

3. 12 C.F.R. § 590.4 (1984).

4. 18 U.S.C. §§ 1961 *et seq.*

> Should Buyer fail to make payment when due or otherwise fail to perform any obligation or covenant under this contract, Seller may pursue any rights and remedies available to Seller under the law to include repossession and or acceleration of Buyer's indebtedness hereunder, *provided that Buyer shall be given a notice of right to cure the default if required by applicable law, before Seller may exercise such right.* (Emphasis added).

The Contract also contains a state choice-of-law provision that provides as follows:

> GOVERNING LAW: Buyer and Seller agree that construction and interpretation of the provisions hereof will be governed by the laws of the State of Georgia.

This state choice-of-law provision, which designates Georgia law as the governing state law for construction and interpretation, does not negate the application of the federal preemption statute to the Contract or affect Petitioners' right to receive notice of default and right to cure when required by the Regulations.

The district court granted GECC's motion to dismiss. On appeal, the Eleventh Circuit affirmed. 866 F.2d 396 (11th Cir. 1989). The court of appeals ruled that "the notice provision plainly meets section 590.4(h)'s requirements." *Id.* at 399. The court held that "since no contradiction exists between the [Regulations] and the application of Georgia law under the choice-of-law clause, DIDMCA applies and the interest rate is not usurious." *Id.* The Eleventh Circuit based its decision on the controlling authority of *Grant v. General Electric Credit Corporation*, 764 F.2d 1404 (11th Cir. 1985) (en banc), *cert. denied*, 476 U.S. 1124 (1986); *Moyer v. Citicorp*

Homeowners, Inc., 799 F.2d 1445 (11th Cir. 1986); and *Quiller v. Barclays American/Credit, Inc.*, 727 F.2d 1067 (11th Cir. 1984), *reinstated on rehearing en banc*, 764 F.2d 1400 (11th Cir. 1985), *cert. denied*, 476 U.S. 1124 (1986). The Eleventh Circuit denied Petitioners' petition for rehearing. The Petition to this Court followed.

REASONS FOR DENYING THE WRIT

THE ELEVENTH CIRCUIT'S DECISION IS A CORRECT APPLICATION OF SETTLED PRECEDENT AND DOES NOT CREATE A SUBSTANTIAL ISSUE FOR REVIEW

A line of Eleventh Circuit authority has clearly established the requirements for preemption of state usury laws under DIDMCA and the Regulations. The opinion below is simply another application of that precedent to a specific contract form. The Eleventh Circuit correctly held that the Contract qualifies for preemption of state usury laws under § 501(c) of DIDMCA and § 590.4 of the Regulations.

The Petition fails to present an issue that merits this Court's review. There is no split in the circuits, and the precedent has clearly and correctly construed DIDMCA and the Regulations. The Petitioners' disagreement with the court of appeals' application of established precedent to the specific language of the Contract is misguided and is not a substantial issue that justifies review on a writ of certiorari.

A. The Contract at Issue Is Entitled to Federal Preemption of State Usury Laws Under DIDMCA and Established Precedent Construing DIDMCA

The opinion below is the fourth in a line of opinions that address the limited issue presented here of whether contractual provisions regarding the debtor's right to notice of default and right to cure disqualify a contract from federal preemption. This precedent establishes that a contract that satisfies the other prerequisites for preemption loses preemption only if the contract "expressly foreclosed" the giving of the notice of default and right to cure. *Atkinson v. General Electric Capital Corp.*, 866 F.2d 396, 398 (11th Cir. 1989). The Contract does not foreclose the giving of notice; rather it expressly preserves that right and is entitled to preemption. This issue is not appropriate for review on certiorari.

In *Quiller v. Barclays American/Credit, Inc.*, 727 F.2d 1067 (11th Cir. 1984), *reinstated on rehearing en banc*, 764 F.2d 1400 (1985), *cert. denied*, 476 U.S. 1124 (1986) and *Grant v. General Electric Credit Corp.*, 764 F.2d 1404 (11th Cir. 1985) (en banc), *cert. denied*, 476 U.S. 1124 (1986), the Eleventh Circuit established the basic principles for applying DIDMCA and the Regulations to specific contracts. In *Quiller*, the court recognized that DIDMCA and the Regulations require certain contractual disclosures as a prerequisite to preemption, such as the disclosure regarding the right to prepay without penalty. 12 CFR § 590.4(d). The Regulations also established debtor rights that were not disclosure rights, but rather regulate the *conduct* of the creditor. Section 590.4(h), which requires that the creditor give the debtor a notice of default and right to cure before taking action to accel-

erate, foreclose or repossess, regulates creditor conduct, not the form of the contract. Thus, *Quiller* held that § 590.4(h) did not require specific disclosure of the notice of right to cure in the contract. *Quiller,* 727 F.2d at 1070.

The *Quiller* court also held that a contract could lose entitlement to preemption if it "contains express provisions authorizing conduct *contrary* to the . . . regulations." *Id.* at 1071 (emphasis in original). In *Grant v. GECC,* decided by the en banc court of appeals on the same day as *Quiller,* the court further explained that a contract would lose preemption only if it contains "affirmative misrepresentations of the debtor's federal statutory guarantees." 764 F.2d at 1409. In *Moyer v. Citicorp Homeowners, Inc.,* 799 F.2d 1445 (11th Cir. 1986), the court of appeals reaffirmed this approach in rejecting a challenge to the specific language of a financing contract.

There is no dispute that the Contract meets all the disclosure requirements of the Regulations. Applying the above precedent, the court of appeals below concluded that the Contract "plainly meets section 590.4(h)'s requirements." *Atkinson,* 866 F.2d at 399. A comparison of the Contract with the contract language in *Grant* and *Moyer* compels the conclusion that the Contract complies with the requirements of § 590.4(h) and is entitled to preemption. The relevant sentence of the Contract reads:

> Should Buyer fail to make payment when due or otherwise fail to perform any obligation or covenant under this contract, Seller may pursue any rights and remedies available to Seller under the law to include repossession and or acceleration of Buyer's indebtedness hereunder, *provided that Buyer shall be given a notice of right to cure the default if required by applicable law, before Seller may exercise such right.* (Emphasis added).

The en banc Court in *Grant* ruled that the following contract language, almost identical to that in the instant case, did not contradict the Regulations and was entitled to preemption. The contract in *Grant* read:

> In the event of Buyer's default in payment when due, Seller may declare immediately due and payable [the debt] provided that Buyer shall be given notice of right to cure default before Seller is permitted to exercise that right.

As here, the right to accelerate in *Grant* was conditioned on the giving of notice. The language expressing the condition precedent in the *Grant* contract is the same as the language in the Contract at issue except for the addition of "if required by applicable law."

Petitioners erroneously contend that the phrase "if required by applicable law" disqualifies the Contract from preemption. To the contrary, "if required by applicable law" is an appropriate limitation on the right to notice since notice may or may not be required under the Regulations. As the court of appeals held and as § 590.4(h) states, there are three separate circumstances in which a creditor may in fact accelerate, repossess or foreclose without giving the section 590.4(h) notice: (1) abandonment; (2) other extreme circumstances; (3) instances in which two notices have been sent during any one-year period. 866 F.2d at 399 and n.3. The contract provision for notice "if required by applicable law" mandates that notice be given unless one of these three circumstances exists. It does not foreclose the giving of notice when required; rather it accurately states the buyer's right to notice.

The court of appeals found that the language of the Contract "appears to be indistinguishable" from the con-

tract found to qualify for preemption in *Moyer v. Citicorp Homeowners, Inc.*, 799 F.2d 1445 (11th Cir. 1986). In *Moyer* the contract provided:

> *Subject to Buyer's Right to Notice of Default and Right to Cure such default, if any,* whenever a default shall occur, or at any time thereafter, (such default not having previously been cured) Seller may declare [the debt] due and payable and Seller shall have all the remedies of a secured party under the Uniform Commercial Code. (Emphasis added).

799 F.2d at 1450. The right to notice "if any" carries the same import as the language at issue here - "if required by applicable law." The *Moyer* court upheld the "if any" language since it "expressly conditions the seller's rights of acceleration and forfeiture [sic] on the *satisfaction of the buyers' right of notice and right to cure.*" 799 F.2d at 1450. (Emphasis added). In the present case, the proviso requiring that the "Buyer shall be given a notice of right to cure the default if required by applicable law" is just another way of saying the same thing—the creditor will not act without giving the notice that is required by law.

In contrast, the Contract does not state or suggest that the creditor can repossess or accelerate "without notice," as did the *Quiller* contract. In *Quiller*, the contract permitted a creditor

> (1) to foreclose on the loan "without notice;" (2) to repossess "without notice or demand for legal process;" and (3) to demand payment of the full balance upon the debtor's default or the creditor's insecurity "without notice."

727 F.2d at 1072. No similar affirmative misrepresentations of the notice right are present here. Rather, as

in *Grant* and *Moyer*, the Contract specifically provides for giving of the notice as required by § 590.4(h) as a condition precedent to the right to accelerate.

Petitioners argue that the opinion below improperly creates a presumption of preemption. Petitioners ignore that Congress did not make the availability of preemption contingent on any specific election or declaration by the creditor or the consumer. As a prerequisite to preemption, Congress did require certain contractual provisions, and there is no dispute that the Contract contains all of these provisions. As noted above, however, § 590.4(h) regulates conduct, not disclosure, and a contract otherwise entitled to preemption can lose preemption only if the creditor actually fails to give the required notice or if the contract forecloses the giving of that notice. Here, there is no claim that GECC failed to give Petitioners the required notice when they defaulted, and the Contract provides for the giving of the required notice. The Contract is entitled to preemption. § 590.4(b)(1).

Petitioners argue that the issues here merit the issuance of a writ because the Solicitor General supported certiorari in *Quiller*. Petitioners, whose counsel represented the debtors in *Quiller* and *Grant*, fail to mention that the Solicitor General did not support the position advanced by the debtors in either case, but supported the petition of the *creditor* in *Quiller* whose contract was held not to comply with the Regulations. *See* Brief of the United States in 85-541 at 16. Moreover, all of the decisions since *Quiller* have been consistent with the position of the Solicitor General in *Quiller*, not with Petitioners' arguments.

B. The Designation of Georgia Law As the Governing State Law Does Not Preclude the Application of Federal Law

Petitioners also contend that because the Contract designates Georgia law as the governing state law for its construction and interpretation, the Contract therefore necessarily *excludes* the application of federal law for any purpose, including preemption. This contention is both illogical and contrary to established law. This issue does not merit review on certiorari.

The state choice-of-law provision at issue is a typical conflicts of law provision and reads:

> GOVERNING LAW: Buyer and Seller agree that construction and interpretation of the provisions hereof will be governed by the laws of the State of Georgia.

The above provision does not exclude or negate the application of federal law, but merely designates the particular state law that will govern the construction and interpretation of the Contract. This Court has held that language substantially identical to the above provision in no way affects the applicability of federal law to the contract. In *Fidelity Federal Savings & Loan Association v. de la Cuesta*, 458 U.S. 141, 157 (1982), the Court said:

> We note, however, that the incorporation of state law does not signify the inapplicability of federal law, for "a fundamental principle in our system of complex national polity" mandates that "the Constitution, laws, and treaties of the United States are as much a part of the law of every State as its own local laws and Constitution." *Hauenstein v. Lynham*, 100 U.S. 483, 490 (1880). See also *Testa v. Katt*, 330 U.S. 386, 390-392 (1947).

In the *Fidelity Federal* case, a mortgage instrument contained a choice-of-law provision stating that it would be governed by "the law of the jurisdiction" in which the property was located. It was argued that the parties had thereby agreed to be bound by state law governing due-on-sale clauses rather than federal law. As here, the argument was that the contractual choice-of-law provision negated the application of preemptive federal regulations issued by the Federal Home Loan Bank Board. The Court rejected this argument, stating that:

> Paragraph 15 [of the mortgage] provides that the deed is to be governed by the "law of the jurisdiction" in which the property is located; *but the "law of the jurisdiction" includes federal as well as state law.*

458 U.S. at 157, n.12 (emphasis added). The Court noted that the purpose of the choice-of-law provision was "not to elevate state law over federal law, but to provide a uniform choice-of-law provision to be used when interstate disputes arose regarding the interpretation of a mortgage." *Id.*

Applying *Fidelity Federal*, the court of appeals concluded that the Georgia choice-of-law provision in the Contract in no way signifies that the Regulations' notice requirements are inapplicable. Rather, "applicable law" includes federal law, since the federal laws "are as much a part of the law of [Georgia] as its own local laws and Constitution." 458 U.S. at 157.

In drafting contracts of this nature, it is important to include a provision specifying the governing state law because, as is recognized in § 590.4(b)(2)(i)(A) of the Regulations, state laws regulate many aspects of the contract not covered in the preemption Regulations. The

choice-of-law provision removes any question of choice of law among the potentially applicable state laws. For example, the Georgia Act places certain requirements on contracts that are different from those in other states, including disclosure of insurance coverage for bodily injury and property damage, a specified "Notice to Buyer" clause, acknowledgment of receipt of the contract by the buyer, type size requirements, and certain requirements relating to insurance covering the manufactured home. Rules of contract interpretation and construction also vary from state to state. A choice of state law provision allows these requirements to mesh with applicable federal law in regulating the contract.

Petitioners erroneously argue that *Volt v. Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University*, 109 S. Ct. 1248 (1989), discards *Fidelity Federal* and allows a choice-of-law provision to negate the application of federal law. In fact, the opinion of the majority in *Volt* does not undercut or even cite *Fidelity Federal*. *Volt* holds only that a state choice-of-law provision can operate to allow a state law to apply where it is not inconsistent with federal law. 109 S. Ct. at 1254-55. As noted above, this meshing of federal and state law is expressly contemplated by the Regulations under DIDMCA and is fully consistent with the court of appeals' decision here. This meshing of federal and state law is precisely what the language of the Contract accomplishes. Contrary to Petitioners' argument, *Volt* does not allow a contractual choice-of-law provision to negate the application of federal law. Even more fundamentally, as the Court recognized in *Volt*, the question of the proper interpretation of a clause in a contract ordinarily does not merit review by this Court. 109 S. Ct. at 1253.

CONCLUSION

The Petition does not satisfy the requirements for the issuance of a writ of certiorari. It does not raise an important issue of federal law, seek to resolve a conflict in the lower courts, or otherwise raise an issue appropriate for this Court's review on a writ of certiorari. The Petition should be denied.

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APPENDIX

In compliance with Rule 28.1, the following are the parent companies, non-wholly owned subsidiaries and affiliates of General Electric Capital Corporation:

General Electric Company

General Electric Financial Services, Inc.

BMW Leasing Corporation

BMW Credit Corporation

FGIC Corporation

Financial Guarantee Insurance Corporation

General Electric Capital Auto Resale Services, Inc.

General Electric Capital Auto Auctions, Inc.

Genstar Container Corporation

Montgomery Ward & Co., Incorporated

Montgomery Ward Holding Corporation

Polaris Holding Company

Polaris Aircraft Leasing Corporation

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No. 88-1953

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JOHN T. ATKINSON, JR., MARIE ATKINSON, HOMER L. OGDEN, AND ALL OTHER PERSONS SIMILARLY SITUATED,

Petitioners,

v.

GENERAL ELECTRIC CAPITAL CORPORATION,

Respondents.

On Petition for Writ of Certiorari To the United States Court of Appeals For the Eleventh Circuit

REPLY BRIEF OF PETITIONERS

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QUESTION PRESENTED FOR REVIEW

Did the Eleventh Circuit Court of Appeals improperly adopt a presumption of federal preemption when, in construing choice of law provisions of mobile home contracts, it determined that the contracts were governed by federal law rather than state law on the sole grounds that the seller of the mobile homes charged an interest rate that was permissible under the Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDMCA") but not under applicable state law?

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IN THE

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OCTOBER TERM, 1989

No. 88-1953

JOHN T. ATKINSON, JR., MARIE ATKINSON, HOMER L. OGDEN, AND OTHER PERSONS SIMILARLY SITUATED,

Petitioners,

VS.

GENERAL ELECTRIC CAPITAL CORPORATION,

Respondents.

On Petition for Writ of Certiorari To the United States Court of Appeals For the Eleventh Circuit

---

REPLY BRIEF OF PETITIONERS

I. THE ELEVENTH CIRCUIT'S DECISION IS AN INCORRECT APPLICATION OF SETTLED PRECEDENT AND DOES CREATE A SUBSTANTIAL ISSUE FOR REVIEW BY THIS COURT.

This Court has, in deciding if Congress has preempted an area of the law by the enactment of a statute, determined preemption questions in the following ways:

1. Looked to whether Congress specifically stated that federal law would occupy a given field.

2. Looked to whether Congress intended that federal law occupy a given field.

3. Looked to whether state law actually conflicts with federal law, and compliance with both is impossible.

4. Looked to whether state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *California v. ARC America Corporation*, 490 U.S. ___ , 104 L.Ed. 2d 86 (1989) at 94-95.

> This Court recently reiterated: "When Congress legislates in a field traditionally occupied by the States, 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 91 L.Ed. 1447, 67 S.Ct. 1146 (1947)."

California v. ARC America Corporation, 104 L.Ed. 2d 86, 94.

In the case at hand, Congress rather than expressing an intent that federal law occupy a given field, has given the drafters of contracts of adhesion the option of deciding by the "terms and conditions" of the contract whether they, the finance companies, want to fall within the federal scheme or fall within the state scheme. The terms and conditions of such contracts have to restrict the rights of acceleration, repossession, or foreclosure as set forth in DIDMCA § 501(c)(2) and 12 C.F.R. § 590.4(h) or the creditor will retain the right to immediately repossess upon default without notice. UCC Art. 9, § 503.

In the case at hand, the only way one can tell whether a contract is a "federal preemption contract" or a contract governed by the laws of the state, is to look at the language employed by the drafters of the contract of adhesion. There is absolutely nothing in the contract utilized by General Electric Capital Corporation (GECC) to indicate that it is a "DIDMCA" contract. The only justification that the Eleventh Circuit had for classifying this form contract as a DIDMCA contract was that the seller and GECC charged a finance charge in excess of that permitted by Georgia law. *Atkinson v. General Electric Credit Corporation*, 866 F.2d 396 (11th Cir. 1989) at 398, 399.

Historically, it has been up to the states, not the federal government, to determine what time price differentials or interest rates can be charged on certain transactions. In deciding whether or not state law is preempted, this Court has maintained that those seeking preemption have the burden, holding:

> "In this case, in addition, appellees must overcome the presumption against finding pre-emption of state law in areas traditionally regulated by the States. See *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 716, 85 L.Ed. 2d 714, 105 S.Ct. 2371 (1985)."

California v. ARC America Corporation, 104 L.Ed. 86, 94.

This same legal principle should be applied to those cases where Congress has given drafters of contracts the right to preempt restrictions imposed by state law by the "terms and conditions" of the contract.

In the case at hand, there is nothing in the language utilized by GECC in the four corners of its contract of adhesion which would indicate that it is anything other than a contract governed by state law. By UCC Art. 9 § 503, creditors have the right to repossess without notice; therefore, the same form contract cannot be used to evidence both federal preemption transactions and transactions governed by state law. Is GECC going to be given the right to claim the protection of UCC Art. 9, § 503 when it repossesses without notice and, then when brought to task about its high finance charges, claim the protection of DIDMCA when the same form contract is used?

II. THE CONTRACT IN ISSUE IS NOT ENTITLED TO FEDERAL PREEMPTION OF STATE LAWS UNDER DIDMCA ACCORDING TO ESTABLISHED PRECEDENTS CONSTRUING DIDMCA.

Contrary to GECC's statements on page 5 of its brief, this opinion is the fifth, not the fourth, in a line of opinions addressing the contractual provisions regarding a debtor's right to notice of default and right to cure with respect to the contract's being a federal preemption contract or a contract governed by state law. In *Doyle v. Southern Guaranty Corporation*, 795 F.2d 907 (11th Cir. 1986) at 911 Note 7, the Eleventh Circuit analyzed both Southern Guaranty's contracts and Fort Wayne Mortgage Company's contracts. These contracts did not contain language requiring notice before acceleration or foreclosure and the Eleventh Circuit held that these contracts were not entitled to preemption under DIDMCA.[1]

[1] The issue of whether or not subsequent amendments to the

GECC misconstrues the Eleventh Circuit decision in *Quiller v. Barclays America/Credit Co., Inc.*, 727 F.2d 1067 (11th Cir. 1984) reinstated on rehearing en banc, 764 F.2d 1400 (1985), cert. denied, 476 U.S. 1124 (1986) by arguing on page 5 of its brief that 12 C.F.R. § 590.4(h) only regulates "conduct of a creditor" and not the form of the contract. Arguments that 12 C.F.R. § 590.4(h) only regulate "conduct" subsequent to the contract completely ignore the mandate of Congress set forth in DIDMCA § 501(c)(2) itself, completely ignore the legislative history which provides that consumer safeguards are a condition to preemption, H. Conf. Rep. No. 96-842, 96th Cong., 2d Sess. 79, reprinted in 1980, U.S. Code Cong. & Ad. News 298, 309, completely ignore the preamble to the proposed regulations, Federal Register Vol. 45, p. 31122 and Vol. 45, p. 43681, and completely ignore the holdings in *Quiller*, 727 F.2d at 1072, and *Doyle, supra*. Furthermore, such arguments overlook Article 9, § 503 of the Uniform Commercial Code which gives a creditor the absolute right to repossess a mobile home upon default without notice *"unless otherwise agreed"*.

The dissent in *Quiller*, 764 F.2d at 1401, pointed out that Barclays America/Credit, Inc. had labeled the contract as a "Federal Preemption Contract". The

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Georgia Motor Vehicle Sales Finance Act and subsequent amendments to the Georgia Usury Statutes would act retroactively to defeat plaintiffs' causes of action was certified by the Eleventh Circuit Court of Appeals to the Georgia Supreme Court and was answered favorably to the consumers and adversely to the finance companies in *Southern Guaranty Corp. v. Doyle*, 256 Ga. 780, 353 S.E. 2d 510 (1987). That opinion was adopted by the Eleventh Circuit in *Doyle v. Southern Guaranty Corp.*, 818 F.2d 754 (11th Cir. 1987).

majority in *Quiller*, *supra*, looked to the terms and conditions, not the label. If the label "Federal Preemption Contract" does not make such a contract a federal preemption contract, how does the mere charging of finance charges in excess of the state law maximum make the contract a federal preemption contract?

In *Grant v. General Electric Credit Corp.*, 727 F.2d 1073 (11th Cir. 1984), en banc 764 F.2d 1404 (11th Cir. 1985) cert. denied, 476 U.S. 1124 (1986), GECC did not specifically provide in that form that Georgia law would govern the contract.[2] As stated in the dissent by Chief Judge Godbold and Judges Kravitch and Vance, "At best the language of the agreement is ambiguous". 764 F.2d 1411. In the case at hand, the terms and conditions selected were unambiguous; that is, the contract was to be governed by Georgia law.

On page 6 of its brief, GECC states that the Eleventh Circuit in *Moyer v. Citicorp Homeowners, Inc.*, 799 F.2d 1445 (11th Cir. 1986) reaffirmed the *Grant* approach in rejecting a challenge to similar specific language chosen by a finance company in a contract of adhesion. One of the form contracts involved in that case had a choice of law provision in which Citicorp called for the application of Georgia law. *Moyer, supra*, at 1451. The Eleventh Circuit held that that form was facially not entitled to preemption. As to the Harrison and Sanders types of forms, the Eleventh Circuit, in making the determination that those contract forms were not facially defective, relied upon

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[2] As Petitioners have previously argued in their Petition for Certiorari p. 18, there is no logical reason for *Grant, supra* and *Quiller, supra* being decided differently.

its construction of State law, UCC Art. 9 § 503. *Moyer, supra*, at 1450 N. 17. Moreover, in *Moyer* the Eleventh Circuit had before it an order granting summary judgment to the consumers against the finance company relating to only two of some fifteen form contracts used by that defendant in the State of Geōrgia where the District Court's ruling was based on specific arguments of facially defective contracts.[3] Cases involving the threshold issue of federal preemption based on the "terms and conditions" of the contract should not be decided on F.R.C.P. 12(b)(6) motions and with the exception of *Grant, supra*, and this case, have not been finally decided on F.R.C.P. 12(b)(6) motions.

III. THE DESIGNATION OF ONLY GEORGIA LAW AS THE GOVERNING LAW PRECLUDES THE APPLICATION OF FEDERAL LAW IN DECIDING THE ISSUE OF PREEMPTION.

GECC takes comfort in this Court's dictum in *Fidelity Federal Savings and Loan Association v. de la Cuesta*, 458 U.S. 141, 157 (1982). In that case, however, the Federal Home Loan Bank Board, in promulgating regulations dealing with due on sale clauses, specifically provided in the preamble to those regu-

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[3] Subsequent to the Eleventh Circuit's opinion in *Moyer, et al. v. Citicorp Homeowners, Inc.*, the Moyer case was settled on behalf of a class of consumers who entered into in excess of 3,700 mobile home finance contracts in Georgia, including those form contracts utilized in evidencing the Harrison and Sanders contracts, the two forms that the Eleventh Circuit held were not facially deficient. The cases of *Quiller, supra*, and *Doyle, supra*, have also been subsequently settled on class wide bases for thousands of consumers in Georgia and other states. These settlements were approved by District Court Judges Anthony A. Alaimo and Dudley H. Bowen, Jr.

lations that it was the intent of the Federal Home Loan Bank Board to preempt state laws to the contrary and for such clauses to be governed *exclusively* by Federal law. 458 U.S. 158. In the case at hand, the Federal Home Loan Board stated just the opposite in the preamble to the consumer protection regulations, stating that if a contract did not comply with the consumer protection regulations being promulgated, that the contract would be subject to state usury law attack. *Federal Register*, May 20, 1980, Vol. 45, p. 31122, and June 30, 1980, Vol. 45, p. 43681.

In the *Fidelity Federal* case, this Court was not faced with a preemption issue in which Congress granted to the drafter of a contract of adhesion the right to select whether or not the contract fell within the federal scheme or the state scheme. In the case at hand, GECC had the right, in drafting its contracts of adhesion, to choose to be governed either by federal law or by state law. The rights given creditors by UCC Art. 9 § 503 and the rights given consumers by DIDMCA § 501(c)(2) and 12 C.F.R. § 590.4(h) do not mesh. It would have been a very simple matter for GECC, the drafter of this contract, to provide in the contract the following:

> "In the event of nonpayment or other default, if (1) Buyer is given written notice of default and right to cure and (2) fails to cure the default as provided herein within 30 days of its postmarked date, then Seller may thereafter accelerate Buyer's indebtedness, repossess the Manufactured Home and/or foreclose. Seller does not have to give such

> notice more than twice in any one year or if the Manufactured Home is abandoned."

Arguments that some aspects of the contract that are not covered by DIDMCA are still governed by State law could be clarified by GECC's providing in the choice of law paragraph in part:

> "Both Buyer and Seller agree that they will each have the rights set forth in the Depository Institutions Deregulation and Monetary Control Act of 1980 and the Consumer Protection Regulations set forth at 12 C.F.R. § 590.4 et seq. Any aspect of this contract not governed by these federal laws and regulations will be governed by Georgia law."

By specifically providing that the *only* applicable law would be Georgia law, GECC made the election not to take advantage of the federal preemption scheme and not to be restricted in its rights to accelerate, repossess, or foreclose as restricted by federal law. While choice of law stipulations in adhesion contracts should be awarded special treatment so as to avoid injustice to the weaker or adherent party, it is contrary to all known principles of contractual construction to ignore choice of law provisions selected by the drafter when they are against the interest of the drafter. *Restatement, Conflicts of Laws,* 2d § 187b, 16 *Am. Jur. 2d, Conflict of Laws,* § 79. When questions of preemption are to be decided by contractual language, the same principles developed in deciding preemption cases based upon statutory or regulatory language should apply as well as the legal maxim that contracts of adhesion are construed against the drafter.

CONCLUSION

The Petition for a Writ of Certiorari presents to this Court an important question of federal law regarding federal preemption that needs to be decided by this Court. For this reason, and for those reasons set forth in the Petition for Writ of Certiorari and in this reply brief, Petitioners respectfully request that this Court grant the Petition.

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